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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1627

TEMPE ELEMENTARY SCHOOL DISTRICT NO. 3, KENNETH J. FULLER, R. CRAIG ROVER, WILLIAM G. PAYNE, GEORGE M. SANCHEZ and JAMES R. PHILLIPS, Members, Tempe Elementary School District No. 3 Board of Trustees, in their official capacities, ERNEST F. BIVINS, in his capacity as Personnel Director, O. S. FEES, in his capacity as Superintendent of Schools, ANDREW R. AVILA, in his former capacity of Principal of Veda B. Frank School,

Petitioners,

v.

SOCORRO HERNANDEZ BERNASCONI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent requests that the Court deny issuance of a Writ of Certiorari herein.

STATEMENT OF THE CASE

This case has been remanded by the Ninth Circuit Court of Appeals to the trial court for further factual findings and, should said findings be favorable to the Respondent herein,

the fashioning of appropriate relief. No remedy of any kind has been ordered by any court at this time.

ARGUMENT

It should be noted that of the two questions presented to the Court, the first assumes that the Petitioner has been required to reinstate Respondent to her former position. The second contends that the Ninth Circuit Court of Appeals misapprehended the trial court's record and therefore, is a plea for a new finding of fact from the trial record.

The Petition fails to present substantial reasons for granting a Writ of Certiorari for the reason that the questions presented are not ripe, are not sufficiently important, and do not present any substantial conflicts in lower court law.

Ripeness

In view of the fact that no court has offered the Respondent any remedy at all at this point, Petitioner's search for review of Mrs. Bernasconi's "reinstatement" (Question 1) is obviously premature. She may be granted any number of other types of remedy.

Further, the Ninth Circuit's recognition that this case may fit the *Mt. Healthy* situation, and its subsequent remand for further factual findings, makes review on Certiorari premature here. *Mt. Healthy City Board of Education v. Doyle*, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977).

After the decisions yet to be made by the lower court on these two issues, the Petitioner may not even want Supreme Court review.

Importance

If this case is determined to fit the *Mt. Healthy* guidelines, it will have no more importance than any other Circuit Court case following U.S. Supreme Court precedent.

Petitioner's warning that millions will be affected by this decision gives little insight as to how the case, as it now stands, will affect those millions.

The Ninth Circuit readily admitted in its decision that there may be any number of cases in which governmental authorities may abridge employees' First Amendment rights and still leave those employees without remedy:

> "We do not reach (the Petitioner's) somewhat unusual interpretation of *Perry*, because even if there is a point at which governmental action is so *de minimis* that it will not trigger a remedy for abridgement of First Amendment rights, ours is not such a case. The transfer of Bernasconi from a position uniquely suited to her talents and desires is precisely the kind of action that is proscribed by *Perry*." (Parentheses added) *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).

The Court simply pointed out that there would remain some abridgments so gross, such as the Petitioner's, that the Court could not look away.

Petitioner offers no reasons advancing the importance of the second question presented. Respondent knows of no legal principle requiring an appeals court to decide an issue on facts it considers insubstantial, without remand.

Conflict

Effort is made to create an illusion of conflict between this case and *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), when none exists. The Ninth

Circuit, in the citation above, pointed out the lack of conflict.

While *Perry* concludes that a governmental entity cannot deny a valuable governmental benefit for constitutionally impermissible reasons, it does not conclude that such a denial is the only governmental act which may be proscribed if improperly motivated. Petitioner would argue that, if murder is punishable by death, no death penalty could be prescribed without a finding of murder. They argue that if the *Perry*-style denial is not shown there is no wrongdoing.

A number of courts, including the Ninth Circuit, have treated improperly motivated governmental actions not involving the denial of benefits. These cases, which are fairly uniform in their treatment of the problems, are ones in which a governmental authority exercised its otherwise legitimate powers to silence dissent or for some other constitutionally impermissible reason. Denial of valuable governmental benefits was not found and did not need to be found in these cases. *cf. Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498, 9 F.E.P. 1287 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); *Adcock v. Board of Education*, 10 Cal. 3d 60, 109 Cal. Rptr. 676, 513 P.2d 900 (1973); *United States v. Gadsden County School District*, 539 F.2d 1369 (5th Cir. 1976); *Cooke v. Orange Belt District Council of Painters*, 529 F.2d 815 (9th Cir. 1976).

CONCLUSION

For those reasons set forth above, Respondent respectfully requests the Court to deny Petitioner's request for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

Dated June 16, 1977

Jerry Levine

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Attorneys for Respondent